

No. 11,595

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DORSEY McMAHAN,

Appellant,

vs.

JAMES A. JOHNSTON, Warden,
United States Penitentiary,
Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLEE.

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PAUL P. O'BRIEN,

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", denying appellant's petition for writ of habeas corpus, and discharging the order to show cause. (Tr. pp. 20-21.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A. Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U. S. C. A. Sections 463 and 225.

STATEMENT OF THE CA

The appellant, an inmate of the Penitentiary at Alcatraz, California, for writ of habeas corpus (Tr. pp. 1- below issued an order to show cause. Thereafter the appellee filed a return to show cause (Tr. pp. 9-12) and the appellant filed a traverse to return order (Tr. pp. 13-16) and a traverse on return to order to show cause (Tr. pp. 17-19.) The matter was then submitted to the court below filed the following order denying writ of habeas corpus and discharge to show cause:

“The motion of respondent to set aside petitioner’s fourth petition for writ of habeas corpus for the reason that the said appellant has not stated a cause of action is well taken.”

“Petitioner by the allegation that he is a fugitive from justice has established that he is a fugitive from justice for a violation of Title 18 U. S. C. (General Escape Act), about which he has no defense. He admits that he is in custody by virtue of process issued by the laws of the United States, his escape from the physical custody of a City Jail is a violation of the laws of the United States.”

commissioner * * * who escapes or attempts to escape from such custody * * * shall be guilty of an offense * * *'.

“From a reading of the foregoing language of the statute, it may be conclusively asserted that petitioner’s argument has no basis in logic or in law.

“IT IS THEREFORE ORDERED that the petition herein be, and the same is, hereby denied and the order to show cause discharged.

Dated: March 7th, 1947.

MICHAEL J. ROCHE,
United States District Judge

From this order appellant now appeals to this Honorable Court. (Tr. p. 22.)

QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to his discharge?

CONTENTION OF APPELLEE.

The answer to the above question is: No.

the merits of appellant's petition on the order to show cause.

Walker v. Johnston, 312 U. S. 275, 284.

Actual physical restraint is not required under the Federal Escape Statute; the word "custody" means simply power, authority or responsibility to control or maintain charge of the prisoner.

Giles v. United States, (CCA-9th) 157 F. (2d) 588, Certiorari denied April 28, 1947.
U. S.

Finally, appellee, is in complete accord with the reasoning of Judge Roche and the statutory authority cited in his order denying appellant's application for writ of habeas corpus and hereby adopts them in toto, together with the decision of this Honorable Court in the case of *Giles v. United States*, supra, as his complete argument on this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below in denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated: San Francisco, California,
June 27, 1947.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,

Attorneys for Appellee.